



15 March 1976

MEMORANDUM FOR: Mr. Cary
Mr. [REDACTED]

Mr. Iams
[REDACTED]

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Attached is an amalgam of the views of the various agencies on S. Res. 400. At this afternoon's ICG meeting, we were asked to review this document as the White House would like to make it available to the Rules Committee. If there are additional comments that should be added, such would be helpful.

Like everything else, the White House would like our views by noon tomorrow, 16 March.

STATINTL

[REDACTED]
Special Counsel to the Director

Administration Views on S. Res. 400

S. Res. 400 is clearly inconsistent with several of the principles for Congressional oversight of intelligence activities the President enumerated in his February 18, 1976, message.

(1) The President recommended that Congress consolidate oversight of the foreign intelligence community in a new Joint Foreign Intelligence Oversight Committee. S. Res. 400, however, would create a new standing Senate Committee with broad legislative and oversight responsibilities for all intelligence activities, domestic as well as foreign.

① Separate Senate and House oversight committees are acceptable as long as the jurisdiction of these committees is exclusive. The new Senate Committee is directed to study the desirability of establishing a joint committee. *good*

② The Administration opposes the provision for placing jurisdiction over domestic as well as foreign intelligence activities in the new committee. FBI's intelligence activities are inseparable from the Bureau's law enforcement responsibilities. Oversight of law enforcement activity is not appropriate for an intelligence-oriented committee. Such combined jurisdiction is also inadvisable because domestic intelligence involves questions of individual constitutional rights not present in the case of most foreign intelligence activities where Americans are not involved. Furthermore, foreign intelligence involves serious national security problems not inherent in domestic intelligence activities. This is a distinction the Courts have often recognized. *OK*

③ (2) Despite the problem of combined jurisdiction of domestic and foreign intelligence discussed above, S. Res. 400 appears to go far toward meeting the President's call for concentrated oversight. In removing jurisdiction for intelligence matters from the Senate Armed Services, Government Operations, Foreign Relations, and Judiciary

Committees, the resolution seems to establish exclusive jurisdiction for such matters within the new Committee on Intelligence Activities. However, the provisions which permit the Committee or any member thereof to disclose any information "relating to the lawful intelligence activities of any department or agency of the United States," to any other Senate Committee or member are not sufficiently restrictive and negate a major advantage of exclusive committee jurisdiction, i. e., reducing the proliferation of sensitive operational information throughout the Congress.

The resolution fails to address the jurisdictional prerogatives of other committees such as the Post Office and Civil Service Committee with regard to civilian personnel matters. In addition, as a resolution without the force of law, S. Res. 400 clearly cannot supersede existing statutory requirements, such as that contained in Section 662 of the Foreign Assistance Act, for Executive reports to several Congressional committees. Separate legislation will be necessary to carry out the President's call for modification of Section 662.

(3) Contrary to the President's statement that Congress should not disclose classified intelligence information provided by the Executive branch without his agreement, the Resolution would allow such disclosures by either the new committee or the full Senate over Presidential objections. This provision raises serious Separation-of-Powers problems and is undesirable as a matter of policy. This provision further creates practical problems of cooperation between the Executive branch and Congress with regard to providing information to the Committee without assurance that such information will not be unilaterally disclosed to the public.

(4) S. Res. 400 goes far beyond the President's call for effective Congressional oversight of intelligence, and grants broad legislative authority to the new committee. This feature is particularly troublesome with regard to the resolution's apparent (but somewhat ambiguous) intent to require annual authorization of appropriations for intelligence activities prior to any Senate consideration of appropriations bills containing funds for intelligence (see section 11, but compare to section 12(a)(7)). It is unrealistic to expect that the secrecy of intelligence budgets and programs could be protected under such a prior authorization procedure. Further, intelligence is contained in more than 30 separate parts of the Defense budget, of which 32 percent is already subject to annual authorization. If an intelligence authorization were to be developed, severe difficulties would be encountered in jurisdictional problems. Section 13 of S. Res. 400 defines intelligence activity in such a manner that tactical foreign military intelligence is not considered "intelligence activity" for this committee's purposes. Such a distinction is virtually impossible to put into effect and can only lead to Congressional involvement in the day to day management of Defense intelligence and increases in expense for preparing detailed explanations of operational intelligence matters well beyond the policy review objectives needed to adequately oversee intelligence activities.

(5) S. Res. 400 would also state the "sense of the Senate" that department and agency heads should keep the new committee "fully and currently informed with respect to intelligence activities, including any significant anticipated activities" Such a provision clearly exceeds the President's statement in his message that "a Congressional requirement to keep the Oversight Committee 'fully' informed" is preferable. Both advanced notification of a proposed activity and the "currently and fully informed" requirement would allow the committee to cross the line dividing oversight from management, thereby raising a Separation-of-Powers issue. Since this provision in a Resolution would not be legally binding on the Executive, it leaves

greater flexibility and fits more comfortably into Separation-of-Powers principles. Nonetheless, inclusion of this "fully and currently informed" provision is undesirable as a matter of policy and would almost certainly provoke confrontations between the two branches.

The provisions in S. Res. 400 for sanctions against Senators and committee staff members who make unauthorized disclosures of classified information are consistent with the President's statement that both Houses should establish firm rules to safeguard intelligence secrets from unauthorized disclosures. These sanctions will mitigate the potential adverse effect of those provisions of the resolution, noted above, which permit the new committee and its members to disclose any information in its possession to other Senate Committees and Members. However, enactment of legislation to impose criminal penalties upon committee staff members who leak classified information is also needed.

The resolution raises other issues not directly covered in the principles announced in the President's message.

Rotating membership for both Committee members and staff may inhibit development of professional competence and thus impede effective oversight.

The requirement of annual, unclassified reports from intelligence agencies appears unwise. It is unlikely to be possible to prepare an annual report of intelligence activities that could be unclassified and remain meaningful and not misleading.

S. Res. 400 also expresses the sense of the Senate that the heads of agencies involved in intelligence activities should furnish "any information" in their control to the new Senate Committee "whenever requested." As noted above with regard to another "sense of the Senate" provision in the resolution, this provision may not be desirable as a matter of policy, but it does leave room for the assertion of Executive privilege in appropriate circumstances.

With regard to Separation-of-Powers, the resolution, in charging the new Committee with assuring that constitutional rights are not violated, may conflict with the President's constitutional responsibility to "take care that the laws be faithfully executed." In this connection, S. Res. 400 requires that all intelligence activities in violation of law or the constitutional rights of any person be reported to the new committee "immediately upon discovery." A determination that a law has been violated requires both factual investigation and legal analysis. If Section 10(c) anticipates communication with the committee prior to the completion of this process, it risks interference with the proper administration of justice and with oversight functions in the Executive Branch, including those of the Intelligence Oversight Board.